Filed 11/5/10 Falossi v. Koenig CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

DAVID FALOSSI, Plaintiff and Respondent, v. FRITZ KOENIG, Defendant and Appellant.	E048400 (Super.Ct.No. CIVMS900013) **OPINION**

APPEAL from the Superior Court of San Bernardino County. J. David Mazurek, Judge. Affirmed in part, reversed in part, and remanded with directions.

Bruce W. Nickerson for Defendant and Appellant.

Mark S. Mahoney for Plaintiffs and Respondents.

Plaintiff David Falossi and defendant Fritz Koenig are neighbors; they live on opposite sides of Hoot Owl Trail in Yucca Valley. Shortly after Koenig moved in, Falossi and his family decided that they wanted nothing to do with him — because they suspected him of being a pedophile, or because they disagreed with his plans for Hoot

Owl Trail, or for both reasons, or perhaps for neither. They told him to stay away from the Falossi children.

Nevertheless, a long series of interactions between Koenig and the Falossis ensued. Koenig's conduct fell at various points along a continuum from the harmless and reasonable to the annoying and inexcusable. In many (though not all) of these interactions, Koenig's conduct consisted of photographing or videotaping the Falossis against their will.

The trial court granted a permanent injunction prohibiting Koenig from harassing the Falossis. (Code Civ. Proc., § 527.6.) The injunction required him to stay at least 50 yards away from them and from their home. It further provided: "Fritz Koenig is not to photograph any member of the Falossi family. Fritz Koenig is to surrender any images or photos stored on any medium of the Falossi family to the Sheriff's Department."

Koenig appeals, arguing:

1. Koenig's allegedly harassing conduct failed to qualify as unlawful harassment, either because it served a legitimate purpose or because it would not have caused a reasonable person to suffer substantial emotional distress.

2. To the extent that Koenig's allegedly harassing conduct consisted of taking photographs, it was constitutionally protected speech and/or petition activity.

3. The trial judge was biased against Koenig and in favor of the Falossis.

4. The injunction is overbroad.

We agree that, to the extent that the injunction ordered Koenig to surrender existing photos of the Falossis, it was overbroad. We also conclude that the injunction, as written, fails to reflect the trial court's oral clarification allowing Koenig to be within 50 yards of the Falossis' property under certain circumstances. Otherwise, we find no error. Hence, we will affirm in part, reverse in part, and remand with directions to modify the injunction accordingly.

I

FACTUAL BACKGROUND

A. *Background*.

Koenig is openly gay. He lives with his life partner, Tomlinson Holman. Koenig is also an amateur photojournalist.

In 2004, Koenig moved into a house on the west side of Hoot Owl Trail in Yucca Valley. Koenig claims to own the adjacent portion of Hoot Owl Trail; it is not subject to an easement, although he lets his neighbors use it as a "neighborly accommodation."

Falossi is Koenig's next-door neighbor. He lives on the east side of Hoot Owl Trail, along with his wife, Elena, and his children, including Marissa, Adam, Mariana, and David, Jr. Falossi is a professional sculptor.

B. *Incidents in 2005*.

When Koenig first moved in, Adam Falossi "got terrible vibes from him." According to Adam, Koenig kept "appear[ing]" and trying to talk to him. "He looked at me like a schoolgirl would." At trial, Koenig denied being attracted to Adam.

In January 2005, the Falossis became concerned about Koenig's "overly[ ] friendly overtures" to Adam. They asked a sheriff's deputy to check whether he was a registered pedophile. They began "to avoid and ignore" him. According to Koenig, if the children saw him, they would stop what they were doing and run back to the house.

Around January 2005, Falossi put up a cross on his property. Also in January, Koenig noticed that some religious figurines and a rosary had been left close to the fence. He thought they were directed at him. At trial, the Falossis denied this.

On January 15, 2005, Koenig told Falossi he was thinking about rerouting Hoot Owl Trail. According to Falossi, he thought this was a bad idea, but he was not angry. According to Koenig, however, Falossi was very upset.

On January 19, 2005, Koenig was having a friendly conversation with David Falossi, Jr., then aged 16. Suddenly, Mrs. Falossi yelled, "David, come back here now." David, Jr., looked frightened and ran away.

In March 2005, a neighbor[1] told Koenig that he had a message from Mrs. Falossi: Koenig "should not look at the children, be around the children or talk to the children . . . ." The neighbor explained that Mrs. Falossi "thought [Koenig] was a sexual predator but . . . she just hasn't found [him] in the databases yet."

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[1] This neighbor was Clairdean Moore. Moore later filed his own separate petition for a harassment injunction against Koenig, which the trial court also granted and from which Koenig has also appealed. (Case No. E047951.)

1. *The go-cart incident.*

On May 18, 2005, Koenig heard loud noises coming from Falossi's property. He walked over to investigate and found that the children were driving go-carts.

According to Mrs. Falossi, Koenig "came right up to the fence, leaned over on it and was grinning at my children." She was "in shock" because "[h]e knew we didn't want him staring at the children." She said, "Would you please give us our privacy and stop staring at my children?" He responded by pointing and saying, "You get back here." She "got extremely frightened, packed the kids up and left."

According to Koenig, he walked to the top of a hill, not right up to the fence. Mrs. Falossi yelled, "Get off that hill." He shouted back, "You should come over . . . to talk." Later, he thought she might have been asserting a property right to the hill. He therefore installed "a flagpole kind of thing" on the hill.

2. *The church visits.*

Koenig talked to a representative of the Falossis' church (Sister Sarah) about the Falossis' religious figurines and also about the Catholic church's attitude to homosexuality. During the conversation, he asked if he would be welcome at their church. According to Sister Sarah, she responded, "More than welcome. Please come."

On Sunday, May 22, 2005, Koenig went to the Falossis' church. According to the Falossis, he sat facing them and "stared at [the] children the entire time . . . ." The following Sunday, he came again and stared at the children "the entire time."

Koenig denied staring at the Falossis or "doing anything untoward . . . ."

3. *The horse riding incidents.*

During the summer of 2005, when Marissa Falossi was having riding lessons, Koenig would go up to the fence and stand there for half an hour at a time, watching her. This happened three or four times. Marissa got so upset that she could not concentrate. Her trainer stopped the lessons because it was dangerous for her to be so distracted.

Koenig testified that he watched only one lesson, and then only "for 30 seconds or a minute." He watched because he was glad that the horses were getting some exercise.

4. *The Deputy Kaukani incident.*

On June 7, 2005, Falossi had Sheriff's Deputy Troy Kaukani accompany him to Koenig's home. In Deputy Kaukani's presence, he asked Koenig to leave him and his family alone. Koenig replied, "I will talk to anyone I want from my property!" He got out a video camera and announced that he was videotaping the incident. He then asked them to leave, and they did.

5. *The David and Goliath incident.*

The next day (June 8, 2005), Koenig installed a hammock on his property. The Falossis estimated that it was 30 feet from the road. In preparation for trial, a private investigator determined that the hammock was 165 feet from the road. However, there was some evidence that Koenig had moved it.

That evening, when Falossi went to water his horses, Koenig was in the hammock. He called out: "So glad to see that you have become comfortable with me here . . . ." Falossi ignored him, but he continued: "And I'll be here. I'm sure you'll get more

comfortable with me. It's been six months in the making. Do you even know what's going on? You don't act like it. I'm sure eventually you'll figure it out. When you finish, why don't you come over here and tell me what you're thinking? You don't need a deputy sheriff to support you. You are David, named for David of the Jews. He didn't need a deputy sheriff, and neither do you. So here I am, and I am not Goliath. Just come over here and tell me what's on your mind." Falossi felt these comments were "intimidating and threatening."

Koenig testified that he chose the hammock location because it had an excellent view of the mountains at sunset. He denied that he was trying to "provoke" Falossi, but he admitted that he was "trying to get him to come over and deal with all of it . . . ."

6. *The range war incident.*

In early June 2005, Falossi parked a commercial truck on a section of Hoot Owl Trail that belonged to Koenig. In retaliation, Koenig parked his van just outside Falossi's property, on another trail that also belonged to him. He then used a video camera to document where the van was parked.

As Koenig started videotaping, he saw that Falossi and one of his sons were likewise videotaping him. He taunted them, saying, "Oh, you guys making a documentary, too?[2] So am I. I think it might be called — I don't know, what do you

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[2] At trial, Koenig claimed that he really thought they might be making a documentary, because David, Jr., wanted to be a filmmaker. To anyone who actually listens to the video, however, it is obvious that he is being sarcastic.

think, 'Range War,' or something like that? 'Clash of the Cultures'? . . . Such a standoff. It's really a metaphor for the 21st century, isn't it? There's no guns involved, just video cameras."

Koenig pointed out his van and warned them that they could not have it towed because it was on his property. He also accused them of having defamed him.

7. *The bumping and grinding incident.*

In early August 2005, as the Falossis were driving home, they saw Koenig and Holman lying in the hammock. According to Falossi, they were engaged in "some passionate making out with some grinding added on the side." Two or three days later, Falossi bought a trailer and parked it so it would block his view of the hammock.

According to Koenig and Holman, they exchanged "a quick peck" on the cheek, but there was no "bumping and grinding." They had no reason to think that any of the Falossis were present.

8. *Photography incidents leading up to the code violation hearing.*

After Falossi installed the trailer, Koenig made "a series of code violation allegations against [him]," including that his art studio was "a public nuisance." Falossi therefore sought a permit for his studio.

On September 9, 2005, Koenig videotaped Falossi and Falossi's property. According to Koenig, he was trying to document the installation of the trailer, which was a code violation.

Sometime in November 2005, Koenig stood at Falossi's property line and videotaped "[his] home and [his] family." Koenig, although not sure, thought he might have been trying to document the fact that the Falossis had parked a commercial vehicle on his property.

On December 1, 2005, Koenig stood at Falossi's fence line and videotaped Falossi. Koenig testified once again that he was trying to document code compliance issues.

On December 5, 2005, the building department held a hearing on Koenig's code violation claims. Koenig documented some of his complaints with photos. After the hearing, Falossi was given the permit, but bringing his property into compliance cost him a "[c]ouple [of] grand."

9. *The December 22, 2005, letter.*

Back on June 10, 2005, Falossi had filed an application for a restraining order against Koenig. Just three days later, however, he had voluntarily dismissed it.

Koenig did not become aware of the application until December 2005. On December 22, 2005, he sent Falossi a certified letter demanding that the application be "completely expunged from the public record." He said that, if Falossi did not comply, he would "proceed with other remedies . . . , which, while they may fill the next year with chores neither one of us need [*sic*] in our lives, I am fully prepared and willing to pursue with vigor." However, he took no further action.

10. *The simultaneous photography incident.*

On January 9, 2006, Koenig photographed Alex Falossi, who was simultaneously photographing him. Koenig did not remember this incident.

C. *Incidents in 2008*.

Between January 2006 and February 2008, there was a period of "relative peace" in which there was virtually no contact between the parties. In late 2007 to early 2008, however, there were three events, some or all of which inferably stirred things up again.

First, in late 2007, Jack McClellan — a child molester who posted photos of children to the internet — became the center of a public controversy. An attorney named Anthony Zinnanti obtained a restraining order, on behalf of his daughter, against McClellan. A state legislator responded by proposing a law against taking photographs of children in public.

Koenig opposed the law as overbroad. As a protest, he downloaded photos of Zinnanti's daughter in suggestive poses (apparently in a bikini), which she herself had posted on the internet, and mailed them to various public officials. Zinnanti responded on his website by accusing Koenig of posting pictures of his daughter on pro-pedophilia websites. Zinnanti also phoned Falossi and made the same accusation to him directly. Falossi was "shocked."

Second, in February 2008, Falossi signed a petition in favor of grading Hoot Owl Trail. Koenig was opposed to the grading project.

Third, on April 1, 2008, Koenig purchased a piece of property abutting the one he already owned. It included a cabin that gave him "an unobstructed view" of Falossi's property.

1. *The Miss Yucca Valley incident.*

In 2008, Marissa Falossi participated in the Miss Yucca Valley pageant. On February 14, 2008, at a town council meeting, each of the pageant contestants was introduced and spoke. When it was Marissa's turn, Koenig moved from the back of the room to the front of the room, then took a photo of her. He did not take a photo of any of the other contestants.

Koenig testified that he had been to town council meetings "30 or 40 times" and took photos there "all the time." He took (or tried to take) a group photo of all the contestants, not just Marissa.

2. *The assault with a camera.*

On April 10, 2008, Koenig "leaped out" from behind his parked car, "forcing [Falossi's] vehicle to stop," pulled out a video camera, and videotaped Falossi and two of his sons. Falossi described this as an "assault with a camera."

Koenig thought that Falossi was referring to an incident in which he (Koenig) had gotten out of his car to videotape a hawk. Just then, Falossi and his two sons drove by in a commercial truck. Koenig videotaped it as it passed. The video showed that he did not force the truck to stop. He did not explain why he was videotaping the truck.

3. *The Buddy conversation.*

On April 25, 2008, Koenig came up to Falossi's fence while Falossi's dogs were on the other side. He said, in a loud voice, "Did Buddy die? Where's Buddy?" Falossi had owned a dog named Buddy who had died of poisoning; however, he had never told Koenig about this. Falossi's children heard this and were "pretty freaked out."

According to Koenig, the dogs had been barking, and he was talking to them to try "to settle them down." He admitted asking if Buddy had died, "because [he] did actually think that possibly Buddy had died in some sort of weird event . . . ." He did not explain how he knew this.

4. *The watering job incident.*

Adam had a part-time job watering a neighbor's plants. On May 13, 2008, as he walked up Hoot Owl Trail to go to his watering job, Koenig was standing on a small hill, some 25 to 75 feet away. Koenig said hello. Adam replied, "The sheriffs told you not to talk to me."[3] Koenig said, "F[uck] the sheriff. He can't tell me that[.]" He then pulled out a camera and started videotaping Adam. The Falossis reported the incident to the police, although not until July 16, 2008, two months later.[4]

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[3] Adam believed — because his father had told him — that Deputy Kaukani had ordered Koenig not to talk to him.

[4] Adam told police that Koenig "looked [him] up and down[,] smiling . . . ." He also told them that "Koenig held [the] videocamera near [Koenig's] penis . . . ." (Capitalization omitted.)

Koenig testified that he was inspecting and photographing his newly purchased property. When Adam said, "The sheriff told you not to talk to me," he replied, "What are you talking about? No sheriff has ever told me not to talk to you." He then videotaped Adam to make a record of the incident. He explained that Sheriff's Deputy Daniel Helmick had told him "to keep a record of things."

Deputy Helmick testified that, *after* the watering job incident, he told Koenig, "You can record that," and he only meant make a *written* record.

5. *The car washing incident.*

On July 17, 2008, Koenig set up a camera on a tripod on his own property and aimed it in the general direction of Falossi's property, several hundred feet away, where Marissa was washing a car. Falossi and Marissa believed that he was photographing her. Koenig testified that he was at least 400 feet away, and he was not photographing Marissa.

6. *The driving lesson incident.*

On July 25, 2008, Mrs. Falossi was giving Marissa a driving lesson. At one point, they saw Koenig, on his own property, about 100 yards away, videotaping them. When they drove around again, Koenig was in the road. He "lurched" up to the driver's side window and said, "Good afternoon" "in a leering and disturbing tone . . . ." When they drove around a third time, Koenig had taken up a position just ahead of their home and was videotaping them again. Marissa was so scared that she ran off the road into some bushes. She reported the incident to Sheriff's Deputy Wagner.

According to Koenig, he and a neighbor, Anne Stoll, were just trying to find and photograph a survey stake.

Stoll confirmed that she and Koenig were out looking for survey stakes. Mrs. Falossi and Marissa drove by; they explained that they were out for a driving lesson. Everybody was friendly. When they drove by a second time and pulled into their driveway, Mrs. Falossi looked upset; she said, "He's doing it again." Stoll did not see Koenig photograph them, but she was not watching him the whole time.

7. *The Briggs incident.*

On October 8, 2008, as Falossi and Adam were driving home, they saw Koenig and another man standing in Hoot Owl Trail. The other man had what appeared to be a gun. Falossi thought he was an armed guard Koenig had hired.[5] Then he realized that the other man was actually holding a camera. He concluded that Koenig and the other man were videotaping him.

The second man, Richard Briggs, testified at trial. According to Briggs, Koenig had arranged a meeting with another neighbor (Moore) to discuss a dispute regarding Hoot Owl Trail and had asked Briggs to videotape it.

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[5] On August 29, 2008, Koenig had emailed a notice to various local residents warning that his property was "subject to patrol by professional armed guards . . . ." (Boldface omitted.)

8. *The Megli incident.*

On October 22, 2008, as Koenig was walking up Hoot Owl Trail to talk to Jerry Megli, a code compliance officer, Mrs. Falossi drove by. Koenig started videotaping her.

According to Mrs. Falossi, Koenig "came . . . towards my car like a bat out of hell, . . . to get the camera in my face to scare me to death right next to my car window . . . ." According to Koenig, he was seven or eight feet away from her car. The videotape itself indicates that he was on the other side of the road; he then either moved a couple of feet closer or zoomed in on her. He claimed that the Falossis had been "driving dangerously," and he was trying to "document" this. No dangerous driving is apparent in the video, however.

9. *The art studio incident.*

Sometime in November 2008, Koenig stood outside the Falossi's fence, holding a video camera and staring into Falossi's art studio.

10. *The Christmas lights incident.*

In November or December 2008, Koenig videotaped Falossi and Mariana putting Christmas lights on the cross.

C. *Incidents in 2009, While This Action Was Pending.*

This action was filed in January 2009. The trial court issued a temporary restraining order that required Koenig to stay at least 50 yards away from the Falossis.

1. *The letter from "James.*"

Around February 26, 2009, Marissa received a letter purportedly from "James." It explained, "Sorry I can't give you my address since I don't need your parents taking me to court, too."

The writer began by complimenting Marissa on a newspaper article about Catholics that she had written. He claimed to be a Catholic who had once thought of becoming a priest. He then said that Koenig was his friend and was "of exceedingly high character and moral virtue." He advised her, "Don't be put off by the fact that he is a homosexual." "Try being cordial to him and don't feed into your parents' unfounded fears." He added, "You might want to let someone at Driver's Education train you in driving instead of letting a hysterical mother do that. You'll be able to concentrate better." He also asked, "[H]ave you repented yet from your lies to Deputy Wagner?"

The Falossis believed that Koenig sent the letter. They considered it to be "witness intimidation." Koenig denied having anything to do with the letter.

2. *The email to the Stones.*

While Koenig was attending a same-sex marriage rally, a process server served him with Moore's harassment petition. (See fn. 1, *ante*, p. 4.) Adam accompanied the process server and identified Koenig for him.

On April 7, 2009, Koenig sent an email to the Stones, who were the Falossis' "close friends and neighbors." It was headed, "15 year old boys should not lie for their mother's purposes." In it, Koenig noted that Adam had helped the process server; he then

asked, "Why is an innocent boy being used to confront an adversary of the mother? Do you subscribe to making Adam a pawn in the mother's obsession?" He noted that the Stones had offered to help "de-stress the situation," and he asked them to do so.

The Stones promptly forwarded the email to the Falossis. The Falossis believed the email was an attempt at "witness intimidation" — Koenig "sent [it] to . . . neighbors who are our good friends so that we would get ahold of it and it would intimidate [Adam]."

Koenig explained that, in a previous conversation, the Stones had offered to help "de-stress the situation," and he sent the email as a request for them to "mediate."

3. *The subpoena incident.*

One day before the trial began, there was a public unveiling of one of Falossi's sculptures. Koenig showed up, accompanied by his attorney. The attorney then served subpoenas on Adam and on 13-year-old Mariana Falossi. Mariana "totally broke down" and cried. According to Falossi, who had subsequently measured the distance, Koenig came within 37 feet of the family.

According to Koenig, he was there to identify the people to be served, and he stayed at least 50 yards away.

II

THE TRIAL COURT'S EXPLANATION OF ITS RULING

At the end of the hearing, the trial court explained its reasoning at some length: "[T]his is not an issue about lifestyle, and . . . this is not a property dispute. . . .

"But the case, to the Court, was about two things. It's about perceptions and reactions. It's about the perceptions of the Falossis [of] Mr. Koenig, it's about Mr. Koenig's reactions to the perceptions of the Falossis, and it's about an escalating pattern of . . . tit for tat. . . .

"It's certainly about the Falossis' perceptions of Mr. Koenig's, what they perceived, whether rightly or wrongly, to be an unnatural interest in their children, and it's Mr. Koenig's perception and reaction that he's not that type of individual, that he's certainly not a child molester and his anger and response to what he perceives as being wrongly accused."

"The Court sees the activities that have gone back and forth . . . as an escalation by [Koenig] to get back at the Falossis . . . under the guise of . . . legitimate reasons for doing something [that] are really to the Court transparent in that you're trying to agitate or irritate the Falossis . . . .

"And when I refer to one-upmanship, these are the kind of things I'm talking about: The Falossis put up a cross; shortly thereafter, you put up this flagpole . . . . The Falossis park their t[r]uck in your driveway; shortly thereafter, you . . . park your van in front of the Falossis' property. They show up with religious symbols along the fence line; . . . you show up at church. . . . They serve you at a public event that is important to you . . . ; you in turn direct your attorney to serve the Falossis at an event that is important to them . . . ."

Other incidents that the trial court specifically referred to as constituting harassment included the David and Goliath incident, the range war incident, the Miss Yucca Valley incident, the driving lesson incident, and the Megli incident. It conceded that "[p]erhaps sometimes" Koenig had a legitimate purpose.

The trial court expressly found "the Falossis to be credible witnesses in this case." It further found that Koenig was not credible.

III

THE SUFFICIENCY OF THE EVIDENCE

Koenig asserts that Falossi brought this action in the unreasonable (or feigned) belief that he was a child molester. He argues that, because there was no evidence that he was *in fact* a child molester, his conduct would not have caused a reasonable person to suffer substantial emotional distress. He also claims that Falossi *really* brought this action to retaliate against him for various property disputes. He argues that his conduct served legitimate purposes. Finally, Koenig asserts additional reasons why two particular incidents did not constitute unlawful harassment.

The same standard of review applies to all of these arguments. "'Where findings of fact are challenged on a civil appeal, we are bound by the "elementary, but often overlooked principle of law, that . . . the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every

reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court.' [Citation.]" (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053.) Koenig is simply arguing, in various ways, that the injunction is not supported by substantial evidence.

Moreover, because the parties did not request a statement of decision (see Code Civ. Proc., § 632), "the doctrine of implied findings applies. 'The doctrine of implied findings requires the appellate court to infer the trial court made all factual findings necessary to support the judgment. [Citation.] The doctrine is a natural and logical corollary to three fundamental principles of appellate review: (1) a judgment is presumed correct; (2) all intendments and presumptions are indulged in favor of correctness; and (3) the appellant bears the burden of providing an adequate record affirmatively proving error. [Citations.]' [Citation.]" (*County of Orange v. Barratt American, Inc.* (2007) 150 Cal.App.4th 420, 438-439.)

A. *General Legal Background.*

Code of Civil Procedure section 527.6 (section 527.6) allows "[a] person who has suffered harassment" to seek "an injunction prohibiting harassment . . . ." (Code Civ. Proc., § 527.6, subd. (a).)

"Harassment" includes "a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be such as would cause a reasonable

person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff." (§ 527.6, subd. (b).)

A "course of conduct" is defined as "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose . . . ." (§ 527.6, subd. (b)(3).) "Course of conduct" specifically excludes constitutionally protected activity. (*Ibid*.)

B. *Lack of Legitimate Purpose*.

Admittedly, Koenig showed that some of his actions *could have* had a legitimate purpose. For example, he could have been at the Falossis' church merely to educate himself about Catholicism. And he could have photographed Marissa at the town council meeting as an exercise in photojournalism. The trial court, however, was not required to believe this.

There was sufficient evidence that Koenig's conduct was for the purpose of causing emotional distress, rather than for any legitimate purpose. With respect to the church visits, Koenig knew the Falossis did not want him staring at their children. Nevertheless, he sat directly opposite them and stared at them the whole time. With respect to the Miss Yucca Valley incident, he waited until Marissa went up to the podium, he moved from the back to the front, and he did not take any photos of any other contestants. Although he claimed that he attended Town Council meetings "all the time" and that he "must have 150 images of people . . . talking at that podium," he did not introduce any such photos. It was reasonable to infer that he went to both the church and

the town council meeting for the sole purpose of harassing the Falossis. A similar analysis applies to most of the other incidents.

The trial court conceded that in some of the incidents, Koenig may have had a legitimate purpose. However, there was sufficient evidence of a sufficient number of incidents in which Koenig had no legitimate purpose.

C. *Ability to Cause Reasonable Emotional Distress.*

There was also sufficient evidence of a sufficient number of incidents that would have caused substantial emotional distress to a reasonable person. The question is not whether the Falossis were reasonable in suspecting that Koenig was a child molester. Rather, it is whether Koenig retaliated in ways that would have caused substantial emotional distress to a reasonable person. Your neighbors may decide to avoid you for the most idiosyncratic of reasons. That does not allow you to go to their church and stare at them, to taunt them, to show up when they are being honored, or to videotape them whenever you see them. The trial court could reasonably find that this conduct would cause substantial emotional distress to a reasonable person.

To some extent, Koenig is knocking down straw men — some of the incidents that he argues were not reasonably emotionally distressing were not offered as instances of harassment, but for some other purpose. For example, the Falossis never claimed that the go-cart incident constituted harassment; it was Koenig who introduced evidence of this incident, to show that Mrs. Falossi was unreasonably sensitive. Likewise, the Falossis never claimed that Koenig's notice to his neighbors that he had armed guards constituted

harassment; it was still relevant, however, to show why the Falossis thought that Briggs was armed with a gun instead of a camera.

We may assume, without deciding, that the Falossis overreacted to even minor incidents. Section 527.6, however, does not require that the plaintiff's *actual degree* of emotional distress be reasonable. It merely requires that: (1) the plaintiff actually suffer substantial emotional distress (even if it is excessive); and (2) a reasonable person would suffer substantial emotional distress (even if to a lesser degree than the plaintiff). There was substantial evidence that both requirements were met here.

Finally, Koenig also argues that Falossi is really "seeking to gain the upper hand in his ongoing property disputes . . . ." Assuming, without deciding, that this is one inference the trial court could have drawn, it was not required to draw it. Indeed, there was really no evidence that, by 2008, Koenig and the Falossis still had ongoing property disputes. (See part IV.B, *post*.) Moreover, there was substantial evidence that the Falossis were genuinely (even assuming excessively) emotionally distressed.

D. *Challenges to Particular Incidents.*

Koenig asserts additional reasons why two particular incidents cannot be regarded as harassment.

First, in connection with the letter from "James," he argues that there was insufficient evidence that he wrote the letter. Not so. There was internal evidence of authorship. The letter praised Koenig as "of exceedingly high character and moral virtue," "a very caring and self-less friend," and "a good person to know." It referred to

"the current problems your parents may have with him as being your neighbor . . . ." It referred specifically to the driving lesson incident; it accused Mrs. Falossi of being "hysterical," and it accused Marissa of lying to Deputy Wagner. Most important, it furthered Koenig's ends by praising Marissa while at the same time urging her to be "cordial" to him and to "repent[] . . . from [her] lies."

In addition, when Koenig was asked whether his fingerprints could be on the letter or the envelope, he was evasive:

"Q Your fingerprints aren't going to be on these documents?

"A No, no, I don't think so.

"Q You're sure your fingerprints aren't going to be on these pages of the original documents?

"A Am I sure? How can I say that?"

"THE COURT: . . . [I]s there any reason your fingerprints would be on this envelope?

"THE WITNESS: Not that I'm aware of. [¶] . . . [¶]

"Q (BY [COUNSEL FOR FALOSSI]) Could they be?

"A Yes, [they] could.

"Q Why do you say that?

"A Because somebody could have given me an envelope and had me touch it and then used it. Same would be true for the letter."

Koenig now derides this line of questioning as "scurrilous 'court room trickery' . . . ." Actually, it was perfectly legitimate. The trial court could reasonably infer that Koenig was afraid that his fingerprints had been found on the letter; from that, it could reasonably infer that he wrote it.

Koenig also argues that the letter was not threatening. Nevertheless, it was sent in violation of a temporary restraining order. It was written anonymously, "since I don't need your parents taking me to court, too." It accused the Falossis of "harass[ing]" Koenig, and it specifically accused Marissa of lying to Deputy Wagner. This would have caused emotional distress to a reasonable person.

Second, in connection with the email to the Stones, Koenig argues that his conduct was not "directed at" the Falossis within the meaning of section 527.6, subdivision (a), because the email was not sent to them. When he sent it, however, he was already subject to the temporary restraining order in this case, which prohibited him from contacting the Falossis. The Falossis testified they were such good friends with the Stones that the Stones could be expected to forward the email to them. Moreover, the Stones *did* forward the email to them. This was sufficient evidence that Koenig's conduct was directed at the Falossis.

Once again, Koenig also argues that the email was not threatening. Much like the "James" letter, however, it was sent in violation of the temporary restraining order; it accused Adam of lying and called him "a pawn in [his] mother's obsession." This would reasonably cause emotional distress.

E. *Witness Credibility.*

Finally, Koenig argues that his testimony was credible, and the Falossis' testimony was not.

"We have no power on appeal to weigh the evidence, consider the credibility of witnesses, or resolve conflicts in the evidence or the reasonable inferences that may be drawn from the evidence. [Citation.]" (*Navarro v. Perron* (2004) 122 Cal.App.4th 797, 803.) "The trial court is the sole arbiter of such conflicts." (*Dodge, Warren & Peters Ins. Services, Inc. v. Riley* (2003) 105 Cal.App.4th 1414, 1420 [Fourth Dist., Div. Two].) "On review for substantial evidence, '"[c]onflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends."' [Citation.]" (*OCM Principal Opportunities Fund, L.B. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 866-867, fn. omitted.) "'Testimony may be rejected only when it is inherently improbable or incredible, i.e., "'unbelievable *per se*,'" physically impossible or "'wholly unacceptable to reasonable minds.'" [Citation.]'" (*Kolender v. San Diego County Civil Service Com.* (2005) 132 Cal.App.4th 1150, 1155, original quotation marks corrected.)

The Falossis' testimony was not inherently incredible or physically impossible. Neither was Koenig inherently credible (as witness his denial that he wrote the "James" letter). We therefore decline this invitation to reweigh the evidence.

IV

THE APPLICATION OF THE FIRST AMENDMENT

Koenig contends that his assertedly harassing photography was protected under the First Amendment, as a matter of both freedom of speech and the right to petition. He also contends that the injunction is an improper prior restraint because it prohibits protected speech and petition activity.

A. *Penalizing Past Action.*

We begin by noting that many of the allegedly harassing incidents did not involve photography at all. In finding harassment, however, the trial court expressly relied on at least some of the incidents that did involve photography. Accordingly, we must determine whether Koenig's conduct in these incidents was constitutionally protected.

Constitutionally protected activity cannot constitute harassment within the meaning of section 527.6. (§ 527.6, subd. (b)(3); *Leydon v. Alexander* (1989) 212 Cal.App.3d 1, 5.)

"'There is no categorical "harassment exception" to the First Amendment's free speech clause.' [Citations.]" (*Rodriguez v. Maricopa County Community College Dist.* (9th Cir. 2010) 605 F.3d 703, 708.) It has been said that "speech that constitutes 'harassment' within the meaning of section 527.6 is not constitutionally protected . . . ." (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1250.) This is true, however, only because the definition of harassment *carves out* constitutionally protected activity. Thus, even if the defendant's

conduct meets the statutory definition of harassment in every other way — i.e., it evidences a continuity of purpose, it is directed at a specific person, it causes the plaintiff to suffer substantial emotional distress, and it would cause a reasonable person to suffer substantial emotional distress — we still must determine whether it is constitutionally protected. (See *Hustler Magazine v. Falwell* (1988) 485 U.S. 46, 50-56 [108 S.Ct. 876, 99 L.Ed.2d 41]; *Commonwealth v. Welch* (2005) 444 Mass. 80, 99-100 [825 N.E.2d 1005].)

Both still photographs and moving pictures can be constitutionally protected speech. (*Regan v. Time, Inc.* (1984) 468 U.S. 641, 648-649 [104 S.Ct. 3262, 82 L.Ed.2d 487]; *Joseph Burstyn, Inc. v. Wilson* (1952) 343 U.S. 495, 502 [72 S.Ct. 777, 96 L.Ed. 1098].) Falossi argues that Koenig's photography was not protected because it did not relate to any matter of public concern. Recently, however, the United States Supreme Court reminded us that "serious value" is not "a general precondition to protecting . . . speech . . . ." (*United States v. Stevens* (2010) ___ U.S. ___, ___ [130 S.Ct. 1577, 1591, 176 L.Ed.2d 435].) "*Most* of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from government regulation. Even '"[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons."' [Citation.]" (*Ibid.*)

"Restrictions on speech based on its content are 'presumptively invalid' and subject to strict scrutiny. [Citations.]" (*Ysursa v. Pocatello Educ. Assn.* (2009) ___ U.S.

___, ___ [129 S.Ct. 1093, 1098, 172 L.Ed.2d 770].) "The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. [Citation.]" (*Ward v. Rock against Racism* (1989) 491 U.S. 781, 791 [109 S.Ct. 2746, 105 L.Ed.2d 661].)

For example, in *Thornburgh v. Abbott* (1989) 490 U.S. 401 [109 S.Ct. 1874, 104 L.Ed.2d 459], federal regulations allowed prison officials to block prisoners from receiving publications that were detrimental to institutional security. (*Id*. at pp. 404-405.) This specifically included publications that described how to build weapons, how to escape from a prison, or how to manufacture drugs. (*Id*. at p. 405, fn. 5.) Conversely, the regulations specifically forbade blocking publications solely because their content was religious, philosophical, political, social, sexual, unpopular, or repugnant. (*Id*. at p. 405.)

The Supreme Court held that these regulations were content neutral. It recognized that the determination of whether a publication was permitted or prohibited "turn[ed], to some extent, on content. But . . . 'neutrality' . . . [i]s intended to go no further than . . . that 'the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression.' [Citation.] Where, as here, prison administrators draw distinctions between publications solely on the basis of their potential implications for prison security, the regulations are 'neutral' in th[is] technical sense . . . ." (*Thornburgh v. Abbott*, *supra*, 490 U.S. at pp. 415-416, fns. omitted.)

The application of section 527.6 to Koenig's photographic activities was similarly content neutral. It turned exclusively on whether those activities reasonably caused the Falossis to suffer substantial emotional distress. Admittedly, that determination turned, to some extent, on whether the photos depicted the Falossis. Even so, the government's concern had nothing to do with any message the photos conveyed. The Falossis did not feel harassed because the photos conveyed a message that they disagreed with or considered unflattering; they felt harassed because of the *way* the photos were taken.

"A content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests. [Citation.]" (*Turner Broadcasting System, Inc. v. FCC* (1997) 520 U.S. 180, 189 [117 S.Ct. 1174, 137 L.Ed.2d 369].) Here, the government had an important interest in preventing harassment and protecting privacy. (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, *supra*, 129 Cal.App.4th at p. 1250 ["'[s]ection 527.6 is intended "to protect the individual's right to pursue safety, happiness and privacy as guaranteed by the California Constitution"'"].) This interest was unrelated to the suppression of speech. Finally, it did not burden substantially more speech than was necessary to protect that interest. Koenig could safely comment on the Falossis in writing or orally, as long as he did not try to contact the Falossis, directly or indirectly. He could also safely take photos of any subject matter other than the Falossis.

Koenig argues that section 527.6 burdened his right to petition because he was taking photos to be used as evidence in official proceedings concerning various property disputes. In some of the incidents that involved photography, however, he did not even claim to be gathering evidence. In others, even if he claimed he was gathering evidence, the trial court did not have to believe him. For example, in the driving lesson incident, he claimed he was looking for survey stakes. This did not explain, however, why he not only videotaped the Falossis, but changed his position every time they drove around so that he would have a better view. While there may have been one or two instances (such as the Deputy Kaukani incident) in which he was indisputably gathering evidence, it does not appear that the trial court relied on these. Indeed, it acknowledged that he had a legitimate purpose for taking at least some of the photos.

We therefore conclude that the trial court did not base its harassment finding on any constitutionally protected activity.

B. *Restraining Future Action*.

We turn to whether the permanent injunction was an improper prior restraint of activity protected by the First Amendment.

The challenged portion of the injunction prohibited Koenig from photographing the Falossis. For the reasons we have already discussed, this was content neutral. "'[T]he injunction was issued not because of the content of [Koenig's] expression, . . . but because of [his] prior unlawful conduct.' [Citation.]" (*Schenck v. Pro-Choice Network* (1997) 519 U.S. 357, 374, fn. 6 [117 S.Ct. 855, 137 L.Ed.2d 1].)

"[T]he proper test for evaluating content-neutral injunctions under the First Amendment [i]s 'whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest,' [citation]." (*Schenck v. Pro-Choice Network, supra*, 519 U.S. at p. 372.) "This test requires 'a balance between the governmental interest and the magnitude of the speech restriction.' [Citation.]" (*DVD Copy Control Assn., Inc. v. Bunner* (2003) 31 Cal.4th 864, 880.)

As we have already noted, the governmental interest here is in preventing harassment and protecting privacy. This interest is strongest when the Falossis are in, going to, or coming from their home. "'"[T]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."' [Citation.]" (*Madsen v. Women's Health Center, Inc.* (1994) 512 U.S. 753, 775 [114 S.Ct. 2516, 129 L.Ed.2d 593].) It is somewhat weaker when they are out in public (see *Gill v. Hearst Pub. Co.* (1953) 40 Cal.2d 224, 230; *Chico Feminist Women's Health Center v. Scully* (1989) 208 Cal.App.3d 230, 242), but even then, they have a reasonable expectation that they will not be stalked, followed, or otherwise targeted in a harassing manner.

It is *theoretically* possible that Koenig could seek to take a wholly nonharassing photograph of the Falossis. *On this record*, however, there is no *evidence* that there is any substantial likelihood of this happening. Almost all of the harassing photography shown by the evidence took place while the Falossis were either on, leaving, or returning to their property. The sole exception was the Miss Yucca Valley incident. Even then,

however, Koenig conducted his photography in a harassing *manner* — waiting until Marissa appeared at the podium, moving from the back of the room to the front, and photographing only her, for no legitimate purpose. Under these circumstances, the record demonstrates that, if he is allowed to photograph the Falossis in public at all, he is likely to do so in a harassing manner. (See *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 146, fn. 9 [once record showed racial insults or epithets sufficiently repeated or pervasive to create a hostile work environment, injunction against nonrepeated or nonpervasive racial insults or epithets was not unconstitutional prior restraint].) Finally, other provisions of the injunction — *which Koenig has not challenged* — prohibit him from following, stalking, or surveilling the Falossis; taking any action to ascertain their location; or getting within 50 yards of them. Under these circumstances, even assuming the Falossis appear at a public event, he is not likely to be in a position to photograph them. (See *id.* at pp. 145-146 [injunction against using racial epithets, even outside plaintiffs' earshot, was not unconstitutional prior restraint where record did not show it was unnecessary to prevent hostile work environment].)

Once again, Koenig argues that the injunction interferes with his right to petition because it prevents him from creating documentary evidence of trespassing or code violations for use in municipal and judicial proceedings. (See *Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1070-1071 ["the photographic investigation of the plaintiffs' property was within the 'breathing space' of the right to petition because it was incidental and related to the defendant's future, non-sham litigation"].) The injunction,

however, prevents him from photographing the Falossis themselves, not their property. There is no evidence that he is likely to need to photograph the Falossis for this purpose. His 2005 code violation claims apparently related to physical conditions of the Falossis' property, such as the presence of a trailer or a parked commercial vehicle. He could still photograph such conditions. In any event, the 2005 claims have long since been resolved.

Admittedly, Koenig also claimed that, in some of the 2008 incidents (i.e., the Briggs incident and the Megli incident), he was conducting videotaping along Hoot Owl Trail in connection with various property disputes. There was no evidence, however, that those disputes were with the Falossis. Koenig had no objection to them using Hoot Owl Trail as a "neighborly accommodation." Falossi signed a petition in favor of grading Hoot Owl Trail, but there is no evidence that he was otherwise involved in the grading project. The Falossis just simply happened to pass by when Koenig was supposedly conducting videotaping for other reasons. Thus, Koenig had no legitimate reason to videotape them, and the trial court so found.

We therefore conclude that the injunction is not an unconstitutional prior restraint.

V

JUDICIAL BIAS

Koenig contends that the trial judge was biased against him.

He forfeited this contention by failing to file a disqualification motion below. (Code Civ. Proc., § 170.3, subd. (c); *People v. Guerra* (2006) 37 Cal.4th 1067, 1111, disapproved on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) At trial,

Koenig's counsel raised an issue as to bias only once: He argued that one of the trial court's questions to Koenig, as a witness, showed bias. After discussing the question with the trial court, however, he conceded, "The Court has adequately refuted the issue of bias." He added, " . . . I wish to apologize publicly and on the record for my mistaken impingement [*sic*] of the Court's bias. It was because I . . . misunderstood the Court's question . . . ."

A fortiori, Koenig also forfeited this contention by failing to file a prompt writ petition. A statutory claim of judicial bias must be raised by writ; it cannot be raised on appeal. (Code Civ. Proc., § 170.3, subd. (d); *People v. Brown* (1993) 6 Cal.4th 322, 335-336; *Roth v. Parker* (1997) 57 Cal.App.4th 542, 547-549.) Failure to pursue a statutory bias claim will also bar a nonstatutory, constitutional bias claim. (*Brown*, at pp. 335-336; *Roth*, at pp. 547-549.)

We do not mean to imply that this contention, if not forfeited, would have merit. In each instance of asserted bias, the trial judge supposedly either used erroneous legal reasoning or made erroneous findings unsupported by substantial evidence.[6] However, "mere judicial error is not conclusive evidence of bias or grounds for

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[6] The only arguable exception is that, when Koenig's counsel was about to begin his opening statement, the trial court warned him, "[T]his is opening statement. It's not an argument." Throughout the trial, however, Koenig's counsel tended to intersperse argument amongst his questions. This warning was a wholly appropriate attempt to keep control of the proceedings. (See *Roitz v. Coldwell Banker Residential Brokerage Co.* (1998) 62 Cal.App.4th 716, 725 [judge's comments expressing frustration with counsel's tactics did not show bias].)

disqualification . . . ." (*People v. Superior Court* (*Dorsey*) (1996) 50 Cal.App.4th 1216, 1231 [Fourth Dist., Div. Two].) "We reject the notion that erroneous rulings, without more, may justify the removal of a trial judge from further proceedings in a case. . . . [T]he leap from erroneous rulings to the appearance of bias is one we decline to make." (*Blakemore v. Superior Court* (2005) 129 Cal.App.4th 36, 59-60.) Accordingly, even assuming Koenig is correct, in that the trial judge committed every one of the supposed errors, that falls short of showing that he was subject to disqualification.

Koenig raises each of these supposed errors under the heading of his overall contention that the judge was biased. We do not understand him to be raising any of them as independent assignments of error. We deem them forfeited as such. (See Cal. Rules of Court, rule 8.204(a)(1)(B).)

By and large, Koenig is simply arguing that the trial court should have drawn different inferences from the evidence. But this does not show bias. In each such case, the evidence was, at worst, in conflict, and the trial court's conclusions are supported by substantial evidence. To take just one example, Koenig argues that his tone in the David and Goliath episode was "pleading" rather than "provocative [and] taunting," as the trial court found. We have watched the video of this incident, and it seems clear to us, just as it did to the trial court, that Koenig was indeed taunting Falossi. This is apparent, not only from the words he used, but also from the fact that Falossi was obviously trying to ignore him, yet he persisted in his unwelcome peroration.

We therefore reject Koenig's claim of bias.

VI

THE SCOPE OF THE PERMANENT INJUNCTION

Koenig contends that the permanent injunction is overbroad.

A. *Additional Factual and Procedural Background.*

Koenig's counsel objected to an order that Koenig stay at least 50 yards away from the Falossis' property, arguing that he would necessarily violate this by going to and from his own property. The trial court responded: "[W]hen he's on his property, certainly he has a reasonable right of access to his property to come and go. The emphasis is going to be when the Falossis are in their yard, . . . you've got to be 50 yards [a]way from them. Stay 50 yards on your side of the fence. If they are not in the yard, go on your property."

Koenig's counsel asked, "If he's there . . . and the Falossis come out?" The trial court responded, "Then he leaves."

As noted, the ultimate written injunction required Koenig to surrender any photos of the Falossis and to stay at least 50 yards away from them and their home. However, it also provided: "This stay-away order does not prevent [Koenig] from going to or from [Koenig]'s home or place of work."

B. *Analysis.*

The trial court had the power to enjoin "harassment." (§ 527.6, subd. (a).) "[T]he court was entitled, in the exercise of its sound judicial discretion, to restrain acts of the same type or class as those unlawful acts which it found had been committed, and whose commission in the future, unless enjoined, would be clearly violative of the public interest

as expressed in the applicable legislation. [Citations.]" (*Woods v. Corsey* (1948) 89 Cal.App.2d 105, 113.)

"In considering the appropriateness of an injunction the court must weigh the expense, inconvenience and possible harm which may come to the defendants if the injunction is issued, and balance these factors against the detriment which may be suffered by the plaintiffs if the injunction is not issued. [Citations.]" (*Crews v. Johnson* (1962) 202 Cal.App.2d 256, 259.) "[A] judicial remedy must be tailored to the harm at issue. [Citations.] A court should always strive for the least disruptive remedy adequate to its legitimate task." (*Butt v. State of California* (1992) 4 Cal.4th 668, 695-696.)

"A trial court's decision to grant a permanent injunction rests within its sound discretion and will not be disturbed without a showing of a clear abuse of discretion. [Citation.]" (*City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1180.)

Koenig argues that the injunction prevents him from using "the [v]ast [m]ajority" of his property. (Boldface omitted.) He fails to supply a citation to the record supporting this claim. The only portion of the record that he does cite — Exhibit A — is a map that has no scale of feet or yards. In any event, the trial court explained that, when Koenig was on his own property, he did not have to stay 50 yards away from the Falossis' property; he simply had to stay 50 yards away from the Falossis themselves. He has not shown that this was unduly burdensome.[7]

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[7] The written injunction does not include the trial court's oral clarification. To the contrary, it provides that Koenig must stay 50 yards away from the Falossis' home

[footnote continued on next page]

Koenig also argues that the trial court relied on an erroneous theory of "remolestation" — that, by coming within 50 yards of the Falossi children or possessing photos of them, he would be "remolesting" them. The trial court articulated no such theory. The only issue with respect to these provisions of the injunction is whether they are supported by substantial evidence. Koenig does argue (albeit tersely) that they are not. We address this issue under this rubric.

The 50-yard stay-away order was supported by ample evidence that, virtually every time Koenig had a face-to-face encounter with the Falossis, he engaged in harassing behavior.

By contrast, the order that Koenig surrender photos of the Falossis was not supported by any evidence that his mere possession of such photos either constituted harassment or was likely to lead to further harassment. The harassment consisted of Koenig's conduct in taking the photos, not his mere possession of them. The Falossis never testified that his mere possession of the photos actually caused them substantial emotional distress. Even assuming it did, it would not cause substantial emotional distress to a reasonable person. Accordingly, we will reverse this portion of the order.

Finally, Koenig argues that the injunction prevents him from viewing certain trial exhibits. Again, this assertion is not supported by any appropriate citation to the record.

[footnote continued from previous page]
at all times, except when going to or coming from his own home. Because the written order can be enforced by the police, who will not have access to the reporter's transcript, it is crucial that the written order correctly reflect the actual ruling. Accordingly, in our disposition, we will direct the trial court to modify the written injunction.

(See Cal. Rules of Court, rule 8.204(a)(1)(C).) It appears to be unfounded; the injunction requires Koenig to surrender photos of the Falossis, but it does not prohibit him from viewing them. Even assuming it did, he does not explain how such a provision would be error. In any event, we are reversing the portion of the injunction that requires him to surrender such photos.

VII

DISPOSITION

The provision of the injunction that "Koenig is to surrender any images or photos stored on any medium of the Falossi family to the Sheriff's Department" is reversed and stricken. The trial court is directed to further modify the injunction so as to provide that Koenig (a) must stay 50 yards away from the Falossis, their jobs or workplaces, and their schools or child care locations at all times, and (b) must stay 50 yards away from the Falossis' home and vehicles at all times except when he is at, going to, or coming from his own property. In all other respects, the injunction is affirmed. Falossi is awarded costs on appeal against Koenig.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

McKINSTER
Acting P.J.

MILLER
J.